

1 HONORABLE RICHARD A. JONES
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE
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15 METROPOLITAN CASUALTY
16 INSURANCE COMPANY,
17 Plaintiff,

18 v.
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20 RICHARD J. BIRMINGHAM, et al.,
21 Defendants.

22 CASE NO. C09-726RAJ
23 ORDER
24
25

26 **I. INTRODUCTION**

27 This matter comes before the court on cross-motions for summary judgment (Dkt.
28 ## 23, 27). The court has considered the parties' briefing and supporting evidence, and
has heard from the parties at oral argument. For the reasons explained below, the court
GRANTS Plaintiff's motion (Dkt. # 23) and DENIES Defendants' motion (Dkt. # 27).

29 **II. BACKGROUND**

30 Plaintiff Metropolitan Casualty Insurance Company ("MetLife") filed this
31 declaratory judgment action seeking a ruling that MetLife did not have a duty to defend
32 or indemnify its insureds, Defendants Richard and Jeanne Birmingham, against
33 counterclaims asserted against them in King County Superior Court by Douglas and
34 Susan Wake.

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38 ORDER – 1

In the underlying King County action, the Birminghams requested a declaratory ruling establishing the boundary line between the Birminghams' and the Wakes' property in the Laurelhurst neighborhood of Seattle. The predecessor owners to the lots owned by the Birminghams and the Wakes had agreed to treat a fence as the boundary line, but after that fence was removed, the boundary line was again in dispute. In addition to a declaratory ruling regarding the boundary line, the Birminghams requested an order to quiet title in the disputed land in themselves, and an order restraining the parties from performing any activities (such as pruning or constructing/destroying fences) in relation to the disputed property. *See* Vacha Decl. (Dkt. # 22), Ex. A (the Birminghams' second amended complaint). The Wakes asserted counterclaims, requesting an order quieting title in themselves and providing other injunctive relief, and raising claims for breach of contract, trespass, and interference with property rights. *See* Vacha Decl., Ex. B (the Wakes' Answer/Counterclaims).

The Birminghams tendered the Wakes' counterclaims to MetLife, under their homeowners' insurance policy, which states in relevant part:

We will pay all sums for bodily injury, property damage and personal injury to others for which the law holds you responsible because of an occurrence to which this coverage applies. . . .

We will defend you, at our expense with counsel of our choice, against any suit seeking these damages. We may investigate, negotiate, or settle any suit. We are not obligated to defend any claim or suit seeking damages not covered under this policy.

Vacha Decl., Ex. E. "Property damage" is defined as "physical damage to or destruction of tangible property, including loss of use of this property." *Id.* The policy's definition of "personal injury" includes "injury arising out of . . . wrongful eviction from or wrongful entry into, or invasion of the right of privacy occupancy of a room, dwelling or premises that a person occupies, committed by or in behalf of its owner, landlord or lessor." *Id.* "Occurrence" is defined as "an accident, including continuous or repeated

1 exposure to substantially the same general harmful conditions during the term of the
2 policy.” *Id.*

3 MetLife initially denied that the Wakes’ counterclaims were covered under the
4 Birminghams’ policy, but eventually decided, “out of an abundance of caution,” to
5 provide a defense subject to a reservation of rights. But the Birminghams had hired
6 private counsel to represent them in the underlying action, and that suit was eventually
7 settled before trial. The Birminghams requested that MetLife pay their legal fees, but
8 MetLife refused. MetLife then filed this declaratory judgment action seeking a judicial
9 opinion as to whether MetLife had a duty to defend the Birminghams against the Wakes’
10 counterclaims. MetLife and the Birminghams have cross-moved for summary judgment
11 on that issue.

12 III. ANALYSIS

13 A. Standard of Review on Summary Judgment.

14 Summary judgment is appropriate if there is no genuine issue of material fact and
15 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
16 moving party bears the initial burden of demonstrating the absence of a genuine issue of
17 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving
18 party meets that initial burden, the opposing party must then set forth specific facts
19 showing that there is a genuine issue of fact for trial in order to defeat the motion.

20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

1 **B. The Wakes' Counterclaims Do Not Trigger Coverage Under the MetLife
2 Policy Because They Do Not Allege Property Damage or Personal Injury as
3 Defined by the Policy.¹**

4 The parties agreed in their briefing and reiterated at oral argument that no factual
5 disputes preclude summary judgment. The parties' dispute centers on whether the
6 Wakes' Answer/Counterclaims allege facts that support coverage under the policy for an
7 occurrence of "property damage" or "personal injury," as those terms are defined by the
8 policy.

9 According to the Birminghams, the Wakes' counterclaims are covered by the
10 MetLife policy as claims for either "property damage" or "personal injury." At oral
11 argument, the court asked the Birminghams which allegations in the Wakes'
12 counterclaims they believed supported coverage, and counsel identified paragraphs 43,
13 44, and 46. Those paragraphs read as follows:

14 43. [The Birminghams] have trespassed onto the Wakes' property.
15 44. The trespasses have caused damages to the Wakes in an amount
16 to be proven at trial.
17 46. Plaintiffs have interfered with Wakes' right to quiet enjoyment
18 and use of their property.

19 Vacha Decl., Ex. B. The court will consider whether these allegations trigger coverage as
20 "property damage" or as "personal injury."

21 **1. The Wakes' Allegations of Trespass Do Not Imply Property Damage.**

22 At oral argument, the Birminghams argued that the Wakes' trespass claim is
23 covered by the policy because of its ambiguity: because some types of trespass involve
24 property damage, and the Wakes alleged they were damaged in some way by the
25 Birminghams' trespass, MetLife should have liberally construed the trespass allegations

26 ¹ MetLife alternatively argued that coverage is not triggered because none of the Wakes'
27 allegations describe conduct that — assuming it resulted in alleged property damage or personal
28 injury — could be considered "an occurrence" under the policy. Because the court concludes
 that the Wakes' counterclaims do not allege either property damage or personal injury, the court
 will not address MetLife's alternative argument.

1 to imply property damage, or investigated the trespass due to ambiguity. *See Unigard
2 Ins. Co. v. Leven*, 97 Wn. App. 417, 425 (1999) (“In Washington, an insurer’s duty to
3 defend an action brought against its insured arises when a complaint against the insured,
4 construed liberally, alleges facts which could, if proven, impose liability on the insured
5 within the policy’s coverage.”).

6 The Birminghams’ argument requires the court to go beyond a liberal
7 construction, however — because there are no allegations in the Answer/Counterclaims
8 suggesting that the Birminghams caused any physical damage or destruction to tangible
9 property. While it is true that some trespasses can result in damage to tangible property,
10 it is also true that some trespasses do not. Thus, a bare allegation of trespass, with no
11 factual allegations suggesting physical damage or destruction to tangible property, does
12 not trigger coverage under the “property damage” provision.

13 Though the Birminghams point to allegations in their own Complaint that could
14 suggest physical damage to tangible property (i.e., the allegations related to the
15 Birminghams’ construction of the fence on property the Wakes believed they owned), the
16 court finds this argument unavailing because the Wakes did not mention the fence in their
17 Answer/Counterclaims. It does not matter that the *Birminghams’* claims against the
18 Wakes were, to some degree, based on the construction of the fence. That the
19 Birminghams alleged facts related to the fence construction in their own complaint does
20 not imply that the Wakes’ claims were based on that event. In general, an insurer need
21 only look to the face of a claim against its insured to determine its duty to defend. *See*
22 *R.A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wn. App. 290, 293 (1980). Thus, because the
23 Wakes did not make any allegations related to the Birminghams’ construction of the
24 fence in their Answer/Counterclaims, the allegations in the Birminghams’ complaint
25 cannot form the basis of the Wakes’ claims.

1 The Birminghams contend that MetLife should have investigated the factual basis
 2 for the trespass claim, even if the face of the claim itself did not allege physical damage,
 3 because the use of the term “trespass” is ambiguous because *some* trespasses result in
 4 property damage. But the fact different types of damages can result from a trespass does
 5 not mean the term itself is ambiguous. “Trespass” is defined as:

- 6 1. An unlawful act committed against the person or property of
 another; esp. wrongful entry on another’s real property.
- 7 2. At common law, a legal action for injuries resulting from an
 unlawful act of this kind.

9 BLACK’S LAW DICTIONARY (8th ed. 2004). Nothing in that definition suggests any
 10 ambiguity. Though a claim’s use of ambiguous terms may obligate an insurer to
 11 investigate further before concluding that coverage is not triggered, this is not such a case
 12 because “trespass” is not an ambiguous term. *See R.A. Hanson*, 26 Wn. App. at 294-95
 13 (“A second exception to the general rule arises when the allegations of the complaint are
 14 ambiguous or inadequate.”). There were no allegations in the Wakes’ counterclaims that
 15 suggested that the Wakes were alleging a trespass that caused physical damage to
 16 tangible property. Thus, this is not a situation where the ambiguity exception applies,
 17 because none of the allegations were ambiguous. *See R.A. Hanson*, 26 Wn. App. at 294
 18 (“[If a complaint’s allegations are ambiguous or inadequate,] [t]hen facts which might
 19 give rise to potential liability must be investigated.”). Therefore, the court concludes that
 20 MetLife did not have a duty to defend based on the policy’s property damage provision,
 21 because even construing the counterclaims’ liberally, the Wakes did not allege any
 22 physical damage or destruction to tangible property.²

23
 24 ² Although the parties’ briefing contained some discussion of how the court should construe the
 second half of the policy’s definition of “property damage” — “loss of use of this property” — at
 oral argument the court asked the Birminghams to identify which allegations would support
 coverage under the “loss of use” clause. The Birminghams pointed to the Wakes’ allegation that
 the Birminghams interfered with their use of the property, and argued that that allegation could
 have been based on physical damage to tangible property. But, as the court has explained in this
 section, none of the Wakes’ allegations actually suggest such damage.

1 **2. The Wakes' Allegations of Trespass Do Not Imply Personal Injury.**

2 Next, the Birminghams argue that the Wakes' trespass allegations support a claim
3 for personal injury due to the allegation that the Birminghams interfered with the Wakes'
4 "use of their property." Vacha Decl., Ex. B ¶¶ 46-47. According to the Birminghams,
5 this type of injury falls under the policy's definition of personal injury: ". . . invasion of
6 the right of private occupancy of a room, dwelling or premises that a person occupies,
7 committed by or in behalf of its owner, landlord or lessor." Vacha Decl., Ex. E.

8 But the Birminghams' argument ignores the second part of that definition:
9 "committed by or in behalf of its owner, landlord or lessor." When asked at oral
10 argument how the Birminghams could be accused of both invading the Wakes' right to
11 private occupancy, and, at the same time, have committed that invasion "by or in behalf
12 of its owner, landlord or lessor," the Birminghams again referred to the construction of
13 the fence. The Birminghams explained that — assuming that the disputed property was
14 actually owned by the Birminghams, though the Wakes believed it to be theirs — when
15 the Birminghams constructed their fence, they were doing so as owners of the property,
16 even though the Wakes believed that it was their property and that the Birminghams'
17 conduct was therefore interfering with their rights. But this tortured explanation fails
18 because there is no suggestion in the Wakes' counterclaims that the Wakes objected to
19 the Birminghams' construction of the fence; the fence is not even mentioned in the
20 Answer/Counterclaims.

21 Because the Birminghams' argument regarding personal injury depends on
22 allegations not included in the Wakes' Answer/Counterclaims, the court finds that the
23 claims against the Birminghams do not allege facts that would impose liability within the
24 MetLife policy. Therefore, the court concludes that MetLife did not have a duty to
25 defend based on the policy's personal injury provision.

III. CONCLUSION

For the reasons stated above, the court GRANTS Plaintiff's motion (Dkt. # 23) and DENIES Defendants' motion (Dkt. # 27).

DATED this 13th day of August, 2010.

Richard A. Jones
The Honorable Richard A. Jones
United States District Judge